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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In The Matter Of the Application Of
HAWAIIAN ELECTRIC COMPANY, INC.

For Approval and/or Modification of
Demand-Side and Load Management
Programs and Recovery of Program
Costs and DSM Utility Incentives.

DOCKET NO. 05-0069

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**MEMORANDUM IN RESPONSE TO MOTION TO INTERVENE AND
MOTION FOR ENLARGEMENT OF TIME OF HONOLULU
SEAWATER AIR CONDITIONING, LLC**

AND

CERTIFICATE OF SERVICE

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**MEMORANDUM IN RESPONSE TO MOTION TO INTERVENE AND
MOTION FOR ENLARGEMENT OF TIME OF HONOLULU
SEAWATER AIR CONDITIONING, LLC**

This Memorandum is respectfully filed by Hawaiian Electric Company, Inc. ("HECO") in response to the Motion for Enlargement of Time ("Motion for Enlargement of Time") and Motion to Intervene ("Motion to Intervene") of Honolulu Seawater Air Conditioning, LLC ("HSAC") (the motions are collectively referred to as the "HSAC Motion") dated June 24, 2005.

HSAC did not file its Motion to Intervene in this docket until over ten weeks after the expiration of the time allowed for intervention. As a result, HSAC filed its Motion for Enlargement of Time. HSAC's Motion for Enlargement of Time should be denied. HSAC has not demonstrated that its failure to file a timely motion to intervene was a result of "excusable neglect". It should be noted that Docket No. 05-0069 is the second Commission proceeding involving the approval of HECO's proposed demand-side management ("DSM") programs in which HSAC had the opportunity to move to intervene. The initial Commission proceeding (which provided a public notice that stated, among other things, that HECO was requesting

approval of its proposed DSM programs and the deadline to file a motion to intervene) involving the approval of HECO's proposed DSM programs was Docket No. 04-0113 (HECO's 2005 Test Year Rate Case).¹ HSAC did not file a motion to intervene in Docket No. 04-0113.

In attempting to explain the reason why its Motion to Intervene was untimely, HSAC did not specify on what date that it became aware of this docket, and the factual statements in support of HSAC's Motion for Enlargement of Time were not supported by an affidavit.

If HSAC's Motion for Enlargement of Time is denied, then HSAC's Motion to Intervene is moot. However, this Memorandum discusses HSAC's Motion to Intervene in the event HSAC's Motion for Enlargement of Time is granted.

HECO takes no position on HSAC's Motion to Intervene. However, in order for the Commission to evaluate the merit of HSAC's Motion to Intervene, HSAC should provide additional information to the Commission concerning HSAC and its proposed seawater air conditioning district cooling proposed projects on Oahu so that a complete evaluation of HSAC's Motion to Intervene (based on the criteria regarding intervention set forth in Hawaii Administrative Rules ("HAR") §6-61-55(b)) can be completed.

The HSAC Motion only contained a general description of HSAC and its proposed projects on Oahu. According to the HSAC Motion (pages 3, 5-6), HSAC was founded by a "for-profit" limited liability company (i.e., Market Street Energy Company, LLC). HSAC is proposing to develop a 25,000 ton seawater air conditioning district cooling system for downtown Honolulu and a similar system for Waikiki. Both projects are expected to be

¹ By Order No. 21698 (Docket Nos. 04-0113 and 05-0069) ("Order No. 21698") issued March 16, 2005, the Commission separated HECO's request for approval and/or modification of its proposed DSM and load management programs from the other issues in Docket No. 04-0113, and opened a new docket (i.e., this docket) in which to consider the DSM and load management programs, and other matters.

completed prior to 2009.

HSAC's interest in this proceeding appears to primarily focus on promoting seawater air conditioning district cooling in order to serve the commercial and multi-unit residential air conditioning market which HSAC contends is one of the "underserved markets for energy efficiency". HSAC is also interested in increasing the level of incentives that would be available to customers that install seawater air conditioning district cooling systems under HECO's proposed Commercial and Industrial Customized Rebate Program. HSAC Motion at 5, 6.

One of the criteria specified in HAR §6-61-55(b) is whether an existing party represents HSAC's interest. In order for the Commission to make such a determination, HSAC should provide additional information to the Commission (e.g., whether HSAC is a member of an existing party) if there is any that would be applicable to this criteria. For instance, if HSAC is a member of an existing party, then there may not be a need to allow HSAC to intervene as HSAC may be able to participate through and have its interest represented by an existing party.

In addition, the nature and extent of HSAC's property and financial interest in the pending matter should be determined (another criteria to be examined pursuant to HAR §6-61-55(b)). The HSAC Motion included general information concerning HSAC's proposed Oahu projects but did not contain project specifics. In order for the Commission to evaluate HSAC's property and financial interest in this docket, HSAC should provide specific information to the Commission concerning HSAC's proposed projects on Oahu (e.g., status of obtaining contracts with proposed customers, status of permitting and approval process, etc.).

II. MOTION FOR ENLARGEMENT OF TIME

Pursuant to HAR Section 6-61-57(3)(b) and Order No. 21698 (page 12, footnote 16), HSAC should have filed its Motion to Intervene no later than April 5, 2005. HSAC did not file its Motion to Intervene until June 24, 2005, over ten weeks after the expiration of the time allowed for intervention. (As discussed further below, the April 5, 2005 deadline was the second opportunity to file a motion to intervene in a proceeding involving the approval of HECO's proposed DSM programs. The initial opportunity to file a motion to intervene was in Docket No. 04-0113 and the deadline to intervene, as stated in the public notice, was January 22, 2005, which was over nine weeks after HECO filed its Application and direct testimonies.)

As a result, HSAC has filed a Motion for Enlargement of Time based on HAR § 6-61-23(a)(2), which states in part:

When by this chapter or by notice or by order of the commission, any act is required or allowed to be done at or within a specified time, the commission for good cause shown may at any time, in its discretion:

* * *

- (2) Upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action on jurisdictional matters and where any order expressly provides that no enlargement shall be granted.

HSAC's Motion for Enlargement of Time should be denied. HSAC has not demonstrated that its failure to file a timely motion to intervene was a result of "excusable neglect".

With respect to why HSAC did not file a timely motion to intervene in this docket, HSAC stated that “[HSAC] was not a party to Docket No. 04-0113 (the Rate Case Docket), only recently became aware of the newly formed Docket No. 05-0069 (the Energy Efficiency Docket), and was therefore unable to file a Motion to Intervene within the time limit prescribed by statutes, rules, or by order of the Commission.” HSAC Motion at 11.

HSAC’s discussion does not support the granting of its Motion for Enlargement of Time. First, the statement that HSAC “was not a party to Docket No. 04-0113 (the Rate Case Docket)” does not show excusable neglect, but does raise the question as to why HSAC did not file a motion to intervene in Docket No. 04-0113, which involved, among other things, the approval of HECO’s proposed DSM programs. HSAC had two opportunities to intervene in Commission proceedings involving the approval of HECO’s proposed DSM programs, and HSAC did not file a timely motion to intervene in either of those proceedings.

HECO’s Application and written direct testimonies filed November 12, 2004 in Docket No. 04-0113, discuss HECO’s proposed DSM programs (including the Commercial and Industrial Customized Rebate Program, which appears to be of primary interest to HSAC). In addition, HECO’s public hearing notice concerning the Application in Docket No. 04-0113 which was published on December 29, 2004 stated, among other things, that (1) HECO’s application requested “approval and/or modification of its demand-side and load management programs” and (2) “motions to intervene or participate shall be filed with the Commission’s Honolulu office by January 22, 2005”. HSAC did not move to intervene by January 22, 2005.

While HSAC makes the general claim that it “only recently became aware” of the “newly formed Docket No. 05-0069 (the Energy Efficiency Docket)” (Docket No. 05-0069 was opened

on March 16, 2005), HSAC does not specify on what date it became aware of Docket No. 05-0069. The factual statements in the HSAC Motion are also not supported by an affidavit.

HSAC's arguments as to why it should be permitted to intervene after the deadline established by the Commission are not persuasive. HSAC's reference (HSAC Motion, page 11) to Maui Electric Company, Limited ("MECO"), Hawaii Electric Light Company, Inc. ("HELCO"), and The Gas Company being given intervenor status in this docket, after the deadline to intervene, is not persuasive as (1) it ignores the facts surrounding the additional parties being given intervenor status, and (2) these additional parties had an existing interest in the issues dealing with statewide energy policies.

First, HSAC ignores the fact that the Commission, on its own action, added MECO, HELCO, Kauai Island Utility Cooperative, and The Gas Company as parties in this docket - these parties did not move to intervene after the deadline. (In Order No. 21861 issued June 7, 2005, page 6, ordering paragraph number 2, the Commission stated "[t]he commission, *sua sponte*, will include HELCO, MECO, KIUC, and TGC as parties in this docket, provided that their participation is limited solely to the issues dealing with statewide energy policies.")² In addition, the parties were added to this docket as the Commission recognized that these parties had an existing interest in the statewide energy policies involved in this docket. (Like the parties that were added to this docket, the County of Kauai also has an existing interest in the statewide energy policies involved in this docket.)

² The Commission stated that "[m]any of the preliminary issues to be considered . . . relate not only to HECO's Proposed DSM Programs, but to statewide energy policies as well. Accordingly, the commission finds that the remaining energy utilities operating in the State - HELCO, MECO, KIUC, and TGC - have interests relating to the subject docket, and their failure to participate in the docket may impair their ability to protect those interests." D&O 21861 at 5-6.

HSAC also contends that there will be “no harm” to the parties to this docket as a result of the enlargement of time. HSAC Motion at 12. Such a contention is speculative as HSAC does not know what will be the total enlarged period of time (i.e., when a determination will be made on the HSAC Motion). HSAC’s contention should also be disregarded as whether the other parties will be harmed by the enlargement of time is not a factor set forth in HAR Section 6-61-23(a)(2) in determining whether to grant a motion for enlargement of time.

II. MOTION TO INTERVENE

HECO takes no position on HSAC’s Motion to Intervene. As the Commission is aware, HSAC does not have a statutory right to participate in this docket.³ HSAC’s Motion to Intervene is governed by the Commission’s Rules of Practice and Procedure regarding intervention.

The general rule with respect to intervention, as stated by the Hawaii Supreme Court, is that intervention as a party to a proceeding before the Commission “is not a matter of right but is a matter resting within the sound discretion of the Commission.” In re Hawaiian Electric Co., 56 Haw. 260, 262, 535 P.2d 1102 (1975); see Re Maui Electric Co., Docket No. 7000, Decision and Order No. 11668 (June 5, 1992) at 8; Re Hawaii Electric Light Co., Docket No. 6432, Order No. 10399 (November 24, 1989) at 5-6.

The Commission exercises its discretion by determining whether or not a movant should be admitted as a party (or as a participant) in a proceeding. HAR §6-61-55(d) specifically states

³ HSAC refers to Hawaii Revised Statutes (“HRS”) Section 269-13 in support of its Motion to Intervene. HSAC Motion at 7. HRS Section 269-13 states “[a]t any investigation by or proceeding before the public utilities commission the public utility or the person concerned, or other respondent or party and any complainant or permitted intervener shall have the right to be present and represented by counsel, to present any evidence desired, and to cross-examine any witness who may be called.” This provision states that a “permitted intervener” (in other words a party that has been permitted to intervene by the Commission) has the right to be present and represented by counsel. The provision does not grant HSAC the status of a party to a Commission proceeding. Compare HRS §269-51 (granting the Consumer Advocate the right to participate in Commission proceedings).

that: "Intervention shall not be granted except on allegations which are reasonably pertinent to and do not unreasonably broaden the issues already presented." Re Hawaii Electric Light Co., Docket No. 7259, Order No. 12893 (December 2, 1993). In addition, the Commission needs to insure "the just, speedy and inexpensive determination of every proceeding," which is the purpose of the Commission's Rules of Practice and Procedure as stated in HAR §6-61-1.

While HECO takes no position on HSAC's Motion to Intervene, in order for the Commission to evaluate the merit of HSAC's Motion to Intervene, HSAC should provide additional information to the Commission concerning itself and its proposed seawater air conditioning district cooling proposed projects on Oahu so that a complete evaluation of HSAC's Motion to Intervene (based on the criteria regarding intervention set forth in HAR §6-61-55(b)) can be completed. The HSAC Motion only contained a general description of HSAC and its proposed projects on Oahu. See e.g., HSAC Motion at 3, 5-6.

For example, HAR §6-61-55(b)(5) requires HSAC to establish "the extent to which the applicant's interest will not be represented by the existing parties." In order for the Commission to make such a determination, HSAC should provide additional information to the Commission (e.g., whether HSAC is a member of an existing party) if there is any that would be applicable to this criteria.⁴ For example, if HSAC is a member of an existing party, then there may not be a need to allow HSAC to intervene as HSAC may be able to participate through and have its interest represented by an existing party.

⁴ With respect to the parties to the docket besides HECO and the Consumer Advocate, HSAC made the generalized statement that "[o]ther interveners are generally supportive of energy efficiency technologies, but have not specifically addressed seawater air conditioning district cooling systems. Furthermore, they may not have specialized knowledge of the operational characteristics and benefits of such systems to fully and adequately represent [HSAC's] interest." HSAC Motion at 9.

In addition, HAR §6-61-55(b)(2) requires the applicant to make reference to “[t]he nature and extent of the applicant’s property, financial, and other interest in the pending matter”. The HSAC Motion included general information concerning HSAC’s proposed projects but did not contain project specifics. In order for the Commission to make a determination as to the nature and extent of HSAC’s property and financial interest in the docket, HSAC should provide to the Commission specific information concerning HSAC’s proposed projects on Oahu (e.g., status of obtaining contracts with proposed customers, status of permitting and approval process, etc.).

DATED: Honolulu, Hawaii, July 5, 2005.

A handwritten signature in black ink, appearing to read "Peter Y. Kikuta", written over a horizontal line.

THOMAS W. WILLIAMS, JR.
PETER Y. KIKUTA

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the foregoing MEMORANDUM IN RESPONSE TO MOTION TO INTERVENE AND MOTION FOR ENLARGEMENT OF TIME OF HONOLULU SEAWATER AIR CONDITIONING, LLC, together with this Certificate of Service, by hand delivery and/or by mailing a copy by United States mail, postage prepaid, to the following:

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